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No. 04-663

Supreme Court, U.S.
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In The
Supreme Court of the United States

STEVEN RADLOFF,

Petitioner,

vs.

CITY OF OELWEIN, JESSIE PAUL, JON REEG, and CURT WILKINSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Were Officers Paul, Reeg and Wilkinson entitled to qualified immunity with respect to their warrantless entry of the Radloff home?

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CONSTITUTIONAL PROVISIONS AND STATUTES

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

Constitution of the United States, Amendment 4.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States, Amendment 14, Section 1.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's

judicial capacity, injunction relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

On the night of May 12, 2000, Defendants Jesse Paul, Jon Reeg and Curt Wilkinson were acting in the course and scope of their employment as police officers for Defendant City of Oelwein when they received a call from their dispatcher referencing a complaint of juveniles drinking at the residence of Plaintiff Steven Radloff. After their observations confirmed the dispatcher's report, the officers entered and searched Plaintiff's home and took him into custody for resisting arrest, interfering with official acts, and supplying alcohol to minors. By his complaint filed on May 2, 2002, Plaintiff Radloff asserted claims against the Defendants for illegal entry and search and excessive force under 42 U.S.C. § 1983 and for assault and battery under Iowa common law. By their amended and substituted answer filed February 6, 2003, Defendants generally denied the allegations of Plaintiff's complaint and raised affirmative defenses of qualified immunity, municipal immunity from punitive damages, good faith, and justification.

Following discovery, Defendants moved for summary judgment with respect to all of Plaintiff's claims against them and Plaintiff moved for partial summary judgment

with respect to his illegal entry and search claim. By its order filed May 19, 2003, the district court granted summary judgment to the individual Defendants with respect to Plaintiff's unlawful entry and search claim on grounds of qualified immunity, denied the individual Defendants' motion for summary judgment with respect to Plaintiff's excessive force claim on grounds that there was a genuine issue of material fact as to the reasonableness of the force used by the officers against the Plaintiff, granted Defendant City of Oelwein's motion for summary judgment on grounds that Plaintiff failed to raise a genuine issue of material fact as to whether the City had a policy or custom tolerating inappropriate police behavior, and denied Plaintiff's motion for partial summary judgment with respect to his illegal entry and search claim. The court's order was reported as *Radloff v. City of Oelwein*, 284 F.Supp.2d 1145 (N.D. Iowa 2003).

Plaintiff dismissed his remaining claims against Defendant Reeg prior to trial and agreed with the court that the jury would not be instructed on his assault and battery claim. His remaining claims against Defendants Paul and Wilkinson were tried to a jury beginning on August 25, 2003. After Defendants' Motion for Judgment as a Matter of Law on grounds of qualified immunity was denied, the jury returned a verdict in favor of Defendants Paul and Wilkinson, and the Court entered judgment accordingly on August 28, 2003. (App. 12-29). On September 8, 2003, Plaintiff filed a Motion for New Trial on grounds of instructional and evidentiary error, which the court denied by its order of September 17, 2003.

Plaintiff filed his Notice of Appeal to the United States Court of Appeals for the Eighth Circuit on October 1, 2003. On August 17, 2004, the Court of Appeals affirmed the

district court's judgment in all respects in a decision reported as *Radloff v. City of Oelwein*, 380 F.3d 344 (8th Cir. 2004). (App. 1-9). Plaintiff filed his Petition for Writ of Certiorari in this court on November 15, 2004.

B. Facts Material to the Consideration of the Question Presented

The following statement of facts is taken primarily from that portion of the district court's Order set forth at Appendix 14-18, with additions set forth in italics. The facts set forth in italics were either undisputed or admitted by the Petitioner in his deposition:

At all material times, the plaintiff was a resident of Oelwein in Fayette County, Iowa. At all material times, defendants Jesse Paul, Jon Reeg and Curt Wilkinson were employed by defendant City of Oelwein as police officers. At the time of the incident on May 12, 2000, the plaintiff lived with his wife and his two sons.

On Friday, May 12, 2000, the plaintiff and his wife learned that their younger son Mark was planning to have some friends come to their house that evening. The plaintiff understood that there would be alcohol at the party and knew that Mark and several of his friends were underage. The plaintiff and his wife kept beer in a refrigerator downstairs and routinely allowed Mark to drink at home.

After having two beers earlier that afternoon at some local bars, the plaintiff resumed drinking beer at his home around 8:00 or 8:30 that night. Mark's guests began to arrive around 8:00 p.m. Several of the guests congregated on the deck in the back of the house.

That evening, Officers Paul and Wilkinson were on duty as patrolmen and Officer Reeg was on duty as a probationary officer undergoing field training under the supervision of Officer Wilkinson. At 11:27 p.m., the Oelwein Police Department received a complaint from an unidentified female that there were juveniles consuming alcohol at or in the area of the plaintiff's residence. After receiving this complaint, the police dispatcher radioed the information to Officers Paul, Wilkinson, and Reeg, the only officers on duty that night. Upon receipt of the call, Officers Paul and Reeg proceeded to the plaintiff's residence and arrived there at 11:40 p.m. They parked the car away from the residence and walked directly north to observe what was going on. Officer Paul observed about a half-dozen to a dozen people on the deck and noted that they were "pretty loud". At 11:45 p.m., Officer Paul called for assistance. Officer Wilkinson responded and arrived at the scene at 11:48 p.m. *While Officer Wilkinson was driving to the Radloff residence, he had his radio on and could hear the other officers running data such as names and birth dates and could hear screaming and yelling in the background.*

As Officers Paul and Reeg started to approach the deck, they could see beer bottles and cans on the railing, however, they could not recall seeing any of the people drinking the beer or with beer in their hands. As the officers approached, some of the people on the deck ran away and some ran into the house. Officer Paul sent Officer Reeg around to the front of the house and he then proceeded to go onto the deck. Officer Paul saw Brian Goede, whom he knew to be a minor, drinking beer inside the house through the kitchen window. Mark Radloff had approximately 10 beers that evening but Mike Radloff, the

plaintiff's older son, had not been drinking. Mark told Officer Paul that he could not enter the house without a warrant but Officer Paul responded that he could and he proceeded to enter the house through the back door into the kitchen. *Officer Paul did not think that he needed a warrant because he had seen a minor drinking inside the house and others trying to leave the premises. When he entered the house, Officer Paul saw Mike Hahn, whom he knew to be a minor, in the kitchen.*

When the plaintiff learned that the police had arrived, he went into his bedroom. When Mike Radloff realized the police were in the house, he went into his parents' bedroom to inform them. The plaintiff and his wife told Mike to deal with the police while they remained in their bedroom.

As Officer Paul walked towards the living room, he heard a noise in the garage, opened the door, and saw Brian Goede run out of the garage. Officer Paul then went back into the living room and down the hallway. As he proceeded down the hallway, Officer Paul opened a closed door and found the plaintiff and his wife sitting on their bed fully clothed with the lights off. The plaintiff had consumed approximately six to eight beers that evening. The plaintiff asked Officer Paul what he was doing in the house, but Officer Paul did not answer. Officer Paul proceeded to search the bedrooms and closets with his flashlight. He then headed into the living room and basement with the plaintiff following him. While the plaintiff was following Officer Paul around the house, he was using obscenities and told him "to get his fat a** out of our house" and to get his "f***ing a** out of our house". Officer Paul found another *two* juveniles in the basement and brought *them* upstairs into the living room. When

Officer Paul came up stairs, he informed the plaintiff that they would contact him at a later date if any charges would be filed. The plaintiff and his son Mark were in the living room yelling and swearing at Officer Paul while Mike was trying to calm them down. Officer Paul then *took the two minors outside.*

In the meantime, Officer Wilkinson was attending to the people in the backyard. He brought the individuals from the backyard out to where his car was parked in front of the house. While he was doing this, Jessica Levendusky, a minor, left the group and went inside the house. Officer Wilkinson got identification from the people outside. He also asked the individuals about who purchased the alcohol but he does not recall what was said. Mark Radloff was speaking with Officer Reeg about 20 feet away from the front door.

Officers Paul and Wilkinson then administered preliminary breath tests to three minors, two of whom tested positive. At this time, Officer Wilkinson advised Officer Paul that Jessica Levendusky had gone inside the residence. While the officers were outside administering the breath tests, Steven Radloff was standing at the front door yelling obscenities at them.

Officers Paul and Wilkinson returned to the front door and asked for Jessica Levendusky to come outside. The plaintiff told Officer Wilkinson that he knew the law and the officers could not enter his home and continued yelling obscenities. Officer Wilkinson responded, "We don't need a warrant, we're investigating a crime, and she needs to come outside". Mark Radloff stepped in front of them and told them they were not coming back inside. When the officers were told that Jessica Levendusky was not inside,

Officer Paul told Mark that if he did not move out of the way and let him in the house, he would be arrested. Mark moved out of the way and Officers Paul and Wilkinson reentered the house. Jessica Levendusky was eventually produced.

Throughout this second entry into the home, Mr. Radloff continued to yell obscenities at the officers. Before leaving the home, Officer Paul placed Mr. Radloff under arrest for interference, resisting arrest, and supplying alcohol to minors. After a brief struggle, Officer Paul handcuffed Mr. Radloff and carried him to a patrol car. When they got to the patrol car, the plaintiff told the officers that he was not getting in and planted his feet to resist. Officer Paul then lowered the plaintiff's head and pushed him into the back seat. (App. 3)

The officers did not have either a search warrant or consent to enter the Radloff house. However, the officers believed that the crimes of consumption of alcohol by minors and supplying alcohol to minors were being committed in the Radloff residence and considered these to be serious offenses, particularly in that there is more of a chance the young individual getting into a vehicle, driving away and harming someone else and himself, and were also concerned that people were fleeing the premises so that there was no time to obtain a warrant before they could be identified and subjected to a breath test.

The officers never drew weapons or had anything in their hands during their search of the house and arrest of the plaintiff. *The officers limited their search of the Radloff house to spaces large enough to hold a person.*

At 12:01 a.m. on May 13, 2000, Officer Paul reported that he had the plaintiff in custody for interference,

resisting arrest, and supplying alcohol to minors. While the plaintiff sat in the patrol car, the officers proceeded to record license numbers of cars in the vicinity and reported those numbers by police radio at 12:14 a.m. Officers Paul and Reeg transported the plaintiff to the city jail where he was held until 1:37 a.m.

The plaintiff entered a plea of guilty to a charge of supplying alcohol to minors. Three individuals were charged with possession of alcohol under the legal age.

C. Exceptions to Petitioner's Statements

Respondents take exception to the following statements made by Petitioner in his Statement of the Case:

1. At pages 2 and 3 of his Petition, Petitioner states that "the Officers testified that they could have, but did not obtain a search warrant." Respondents take exception to this statement to the extent that it might imply that the officers had sufficient time to obtain a warrant. While Officer Wilkinson did testify that "we could have obtained a search warrant", his testimony was in the context of probable cause rather than opportunity. Officer Paul testified that their ability to obtain a search warrant "would depend on manpower, whether or not the Judge was available, whether or not the County Attorney was available." Officer Reeg testified that he didn't "think the number of guys we had and the circumstances involved would have gave us the opportunity to make sure that all the minors could get out of the house without fleeing and driving away."

2. At page 3 of his Petition, Petitioner states that "Mr. Radloff and his family testified that he did not go

outside the house that evening." While that statement is technically correct, Mr. and Mrs. Radloff and their son Mike all confirmed the officers' testimony that Mr. Radloff stood in the front doorway of his house addressing the officers.

3. At page 4 of his Petition, Petitioner states that "the Officers moved for summary judgment citing as an exigent circumstances noise, and that Mr. Radloff retreated into his house." In fact, Respondents' motion for summary judgment and supporting memoranda also addressed the exigent circumstances of public safety, imminent escape of a suspect, and destruction of evidence, all of which grounds were considered by the District Court and Court of Appeals in their rulings. (App. 6-7, 22-24).

REASONS FOR DENYING THE PETITION

A. Introduction

1. The District Court Decision

The district court held that Officers Paul, Reeg and Wilkinson were entitled to summary judgment on Radloff's unlawful entry and search claim on grounds of qualified immunity. (App. 20-25). The court acknowledged that a warrantless search of a home is unlawful unless made in the presence of probable cause and exigent circumstances, but for purposes of its qualified immunity analysis recognized that "the question in this case is not whether there were actual probable cause and exigent circumstances but whether the officers could reasonably have thought so." (App. 21). In analyzing this question, the court first determined "that the officers reasonably could have believed that they had probable cause to enter the

house without a warrant based upon their observations and knowledge. Officer Paul saw an individual he knew to be a minor drinking a beer in the kitchen and he also observed several other individuals run away or into the house after the officers arrived." (App. 21). Having determined that a reasonable police officer would have had probable cause to believe that there was underage drinking in the house, the court next proceeded to analyze the question whether a reasonable officer could have believed that he was confronted with exigent circumstances that would justify an exception to the warrant requirement. After first noting that the exigent circumstances exception extends to situations in which evidence is about to be destroyed and to dangerous situations in which safety is threatened, the court proceeded to consider the holding of *Welsh v. Wisconsin,* 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984), in which this court declared "that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is to be made" but declined to consider "whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses." After finding a split of authority in state court decisions applying the exigent circumstances test to teenage drinking parties, the court concluded that the officers were entitled to qualified immunity on the plaintiff's claim of unreasonable entry and search of the house because "it was not clearly established law that an officer could not enter a house where there were known minors drinking alcohol inside." (App. 23).

2. The Court of Appeals Decision

The Eighth Circuit Court of Appeals affirmed the district court's ruling, holding that "summary judgment on qualified-immunity grounds was proper because we think the officers acted on a reasonable belief that probable cause and exigent circumstances existed." (App. 7). The court found that "probable cause existed because it was reasonable for the officers to believe illegal activity was taking place after officer Paul observed a minor he recognized drinking a beer inside the home" and that "exigent circumstances existed both because of the loud noise created by the party and because of the threat to public safety if the juveniles left the house in cars while under the influence of alcohol." (App. 6).

3. The Issue Presented

The only issue presented in Radloff's petition is whether the Court of Appeals correctly affirmed the district court's finding that the officers could have reasonably believed that exigent circumstances existed in this case to enter the house. Radloff's petition does not question the lower courts' findings that the officers reasonably could have believed that they had probable cause to enter the house without a warrant, that the officers had probable cause to arrest Radloff, or that Radloff failed to present sufficient evidence to impose liability on Respondent City of Oelwein. Neither does Radloff's petition raise any issue with respect to the jury's verdict in favor of Respondents on his excessive force claim.

B. The Grant of Summary Judgment on Grounds of Qualified Immunity is not in Conflict with the Decision of Another United States Court of Appeals or any Relevant Decision of this Court

Rather than arguing that the decision of the Eighth Circuit Court of Appeals affirming the district court's grant of summary judgment to Respondents on grounds of qualified immunity is in conflict the decision of another court of appeals or any relevant decision of this court, Petitioner contends that the appeals court misapplied a properly stated rule of law to the facts of this case. Specifically, he cites a number of authorities for the well-established general principal, recognized below by both the Eighth Circuit Court of Appeals (App. 5-6) and the district court (App. 21), that a warrantless search of a home may be conducted only upon probable cause and exigent circumstances, and then argues that no reasonable officer could have believed that exigent circumstances were present under the facts of this case.

In making his argument, Petitioner places considerable emphasis on this court's decision in *Welsh v. Wisconsin*, 466 U.S. 740, 80 L.Ed.2d 732, 104 S.Ct. 2091 (1984). The question presented in *Welsh* was whether the Fourth Amendment prohibits the police from making a warrantless entry of a person's home in order to arrest him for a nonjailable traffic offense, *Welsh*, 466 U.S. at 741. Although the court held that the gravity of the underlying traffic offense for which the arrest was being made was "an important factor to be considered when determining whether any exigency exists," *Id.* at 753, it declined "to consider whether the Fourth Amendment may impose an absolute ban on warrantless home arrests for certain minor offenses" because "in the circumstances presented by this

case, there were no exigent circumstances sufficient to justify a warrantless home entry." *Id.* at 750 n.11. Specifically, the court found that the state's "claim of hot pursuit is unconvincing because there was no immediate or continuous pursuit of the petitioner from the scene of a crime" and that "because the Petitioner had already arrived home, and had abandoned his car at the scene of the accident, there was little remaining threat to the public safety." The only remaining potential exigency, the need to ascertain the Plaintiff's blood-alcohol level, was deemed insufficient to support a warrantless entry for a "noncriminal, civil forfeiture offense for which no imprisonment is possible." *Id.* at 753-54.

Welsh was not a qualified immunity case. In *Harlow v. Fitzgerald*, 457 U.S. 800, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982), this court held that government officials performing discretionary functions generally are shielded from liability for civil damages by qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Whether an official protected by qualified immunity may be held personably liable for an alleged unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Anderson v. Creighton*, 483 U.S. 635, 639, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to know that the law forbade conduct not previously identified as unlawful. On summary judgment, the question whether the law was clearly established is a matter of law for the court to

determine. *Harlow*, 457 U.S. at 818. In order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government is not that they always be correct, but that they always be reasonable. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. *Illinois v. Rodriguez*, 497 U.S. 177, 185-86, 111 L.Ed.2d 148, 110 S.Ct. 2793 (1990).

In *Anderson*, the question presented was whether a law enforcement officer who participates in a search that violates the Fourth Amendment may be held personably liable for money damages if a reasonable officer could have believed that the search comported with the Fourth Amendment, *Anderson*, 483 U.S. at 636. The court recognized that the operation of this standard depends substantially upon the level of generality at which the relevant "legal rule" is to be identified, *Id.* at 639. Thus, in the context of a warrantless home search, qualified immunity cannot be denied merely because a reasonable officer would have known of the general rule that a home cannot be entered without a warrant in the absence of probable cause and exigent circumstances:

> It simply does not follow immediately from the conclusion that it was firmly established that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson search was objectively legally unreasonable. We have recognized

> that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personably liable. [citation omitted] The same is true of their conclusions regarding exigent circumstances.

Id. at 641.

In *Saucier v. Katz*, 533 U.S. 194, 150 L.Ed.2d 272, 121 S.Ct. 2151 (2001), the court further refined the qualified immunity analysis by prescribing the analytical framework to be followed by a district court in considering a motion for summary judgment. First, a court required to rule upon the qualified immunity issue must consider the threshold question whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officers conduct violated a constitutional right. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established in light of the specific context of the case, *Saucier*, 533 U.S. at 201. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted, *Id.* at 202.

If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. Qualified

immunity protects all but the plainly incompetent or those who knowingly violate the law, *Id.* at 202. Even if a court were to hold that the officer violated the Fourth Amendment by conducting an unreasonable, warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions. *Id.* at 206.

Applying the test that it had articulated, the court in *Saucier* assumed that a constitutional violation could have occurred under the facts alleged based simply on the general rule prohibiting excessive force, and then proceeded to the question whether this general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances the officer faced, *Id.* at 207-08. Applying the same analytical approach, the Court of Appeals and the district court both found that the officers acted on a reasonable belief that probable cause and exigent circumstances existed. (App. 7, 21).

Petitioner contends that both lower courts misapplied *Welsh* to the facts of this case, arguing that it was established law that reasonably should have been know to the officers that a warrantless entry could not be made for a minor offense even in the presence of probable cause and exigent circumstances. If the officers had been given the opportunity to peruse *Welsh* and subsequent judicial developments, they would have drawn no such conclusions.

Initially, if the officers had read *Welsh* they would have noted that its result was premised upon a significantly different fact situation. In *Welsh*, the officer had not personally observed Welsh's violation of the law, which

under Wisconsin law was a noncriminal, civil forfeiture offense. Here, the officers personally heard loud noise coming from the Radloff residence, saw at least one known minor consuming alcohol, observed as many as a dozen people flee from the deck both into and away from the house upon their approach, and witnessed Radloff screaming obscenities into the night from his front doorway. The officers' personal observations could have given them reasonable grounds to believe that several criminal offenses had taken place. Under Iowa Code § 123.47 a person who is under legal age who possesses beer commits a simple misdemeanor punishable by a fine of $100.00 for the first offense, and a person who is of legal age who provides beer to a person who is under legal age commits a serious misdemeanor punishable by a minimum fine of $500.00. Under § 723.4, disorderly conduct is a simple misdemeanor, and § 719.1 defines interference with official acts (absent infliction of bodily injury or display of a dangerous weapon) as a simple misdemeanor with a fine of not less than $250.00. Iowa Code § 903.1 provides generally that for a simple misdemeanor, there shall be a fine of at least $50.00 but not to exceed $500.00, and that the court may order imprisonment not to exceed 30 days in lieu of a fine or in addition to a fine; and that for a serious misdemeanor, there shall be a fine of at least $250.00 but not to exceed $1,500.00, and that in addition the court may also order imprisonment not to exceed one year. Not only were jailable offenses involved in this case, the subsequent decision of *Atwater v. City of Lago Vista*, 532 U.S. 318, 348, 149 L.Ed.2d 549, 121 S.Ct. 1536 (2001) rejected a bright-line distinction between "jailable" and "fine-only" offenses in the context of determining probable cause for a warrantless arrest.

Officers Paul, Wilkinson and Reeg also faced exigent circumstances very different from those in *Welsh*. In *Welsh*, the suspect had abandoned his car and retreated to his home before the police arrived at the scene, so that there was neither hot pursuit nor any risk of an intoxicated driver taking to the public streets. At the Radloff residence, in contrast, the officers witnessed the offenses being committed, saw people flee upon their approach, and had a legitimate concern that intoxicated, underage drivers might escape the scene by driving in a manner hazardous to public safety. In *Greiner v. City of Champlin*, 27 F.3d 1346, 1353-54 (8th Cir. 1994), the Eighth Circuit Court of Appeals found that officers who encountered a loud party late at night had probable cause to arrest the homeowners for maintaining a public nuisance and were justified in entering the house where they had reason to believe the Plaintiffs were defying their orders. Both the Iowa Supreme Court, in *State v. Brecunier*, 564 N.W.2d 365, 368 (Iowa 1997), and the Eighth Circuit Court of Appeals, in *United States v. Boettger*, 71 F.3d 1410, 1414 (8th Cir. 1995), had previously recognized that legitimate concern for the safety of individuals may constitute exigent circumstances justifying warrantless entries and searches. In *United States v. Santana*, 427 U.S. 38, 42-43, 49 L.Ed.2d 300, 96 S.Ct. 2406 (1976), the court held that a suspect standing in her doorway was in a public, rather than private, place and that officers who entered the door when she retreated farther into her house upon their approach were acting under the exigent circumstance of hot pursuit. In *United States v. Ball*, 90 F.3d 260, 263 (8th Cir. 1996), the court concluded that the actions of a suspect fleeing from his porch into his residence led to a reasonable belief that he might escape or try to destroy evidence so that immediate police action was required without delaying to

obtain a warrant. In *United States v. Rohrig*, 98 F.3d 1506, 1522 (6th Cir. 1996), the court upheld a warrantless entry into a home for the purpose of abating loud and disruptive noise, finding that the Defendant had undermined his right to privacy by projecting loud noises into the neighborhood late at night. The court emphatically rejected the notion that a warrantless entry is permissible only when all conceivable alternatives have been exhausted, as such a rule would require the courts to ignore the day-to-day and minute-to-minute demands upon police officers, and to instead evaluate their conduct under a standard established with the benefit of hindsight, *Id.* at 1524.

If the officers, like the district court, had examined decisions from other jurisdictions interpreting the exigent circumstances exception in light of *Welsh* in the context of an underage drinking party, they would have discovered a conflict of authority. In a case decided less than a year before the incident giving rise to this case, the court in *Howes v. Hitchcock*, 66 F.Supp.2d 203, 213-17 (D.Mass. 1999) noted that "other jurisdictions interpreting the Fourth Amendment, both at the time of the officers' entry into the *Howes* residence and more recently, have reached conflicting conclusions" concerning the issue of exigent circumstances in the context of the teenage drinking party. Under Massachusetts law, underage drinking was a misdemeanor punishable by a maximum fine of $50.00. The *Howes* court cited *State v. Jangala*, 154 Ore.App. 176, 961 P.2d 246, 247-48 (1998) and *State v. Johnston*, 184 Wis.2d 794, 518 N.W.2d 759, 766 (1994) as cases recognizing the existence of exigent circumstances and *People v. Olson*, 112 Ill.App.3d 20, 444 N.E.2d 1147, 1150 (1983) and *Commonwealth v. Roland*, 535 Pa. 595, 637 A.2d 269,

271-72 (1994) as cases holding that no exigent circumstances existed to support the warrantless entry of a home to investigate underage drinking. After noting the lack of clarity in the law, the court went on to conclude, at 215-16 that:

> While this case is a useful wake-up call to the police that the Fourth Amendment applies to police home entries to stop teenage drinking parties, the question here is whether an objectively reasonable officer could have believed that exigent circumstances justified his entry into the Howes residence. First, an objectively reasonable officer in the circumstances faced by Defendants could have concluded that, once Officer Decker knocked on the front door and spoke to several partygoers, many of the besotted teenagers would have fled. Others would have attempted to destroy or at least conceal evidence of the teenagers' drinking had the officers waited patiently to obtain a warrant.

Radloff's argument at pages 11-12 of his Petition that "what the appeals court essentially did is create a blanket exception to the warrant clause for cases in which there is probable cause to believe that a minor is drinking in a house" is patently incorrect. It is clear from their decisions that both the Eighth Circuit and the district court conducted the particularized analysis mandated by *Anderson* and *Saucier*. Conversely, it is the Petitioner who is asking this court to establish a bright-line test by holding that a warrantless entry can never be upheld where the offense involved is underage drinking. To create such a rule would be inconsistent with this court's statement in cases such as *Ohio v. Robinette*, 519 U.S. 33, 39, 136 L.Ed.2d 347, 117 S.Ct. 417 (1996) that it has "consistently eschewed bright-line

rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." Even if such a rule were adopted, however, it would not affect the outcome of the present case, as the law was not clearly established at the time of the acts involved.

CONCLUSION

Petitioner Radloff's Petition for Writ of Certiorari should be denied for the reasons set forth above.

Respectfully submitted,

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